



SPECIALIST PROSECUTOR'S OFFICE  
ZYRA E PROKURORIT TË SPECIALIZUAR  
SPECIJALIZOVANO TUŽILAŠTVO

**In:** KSC-BC-2020-06  
**The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi**

**Before:** Court of Appeals Panel  
Judge Michèle Picard  
Judge Emilio Gatti  
Judge Nina Jørgensen

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Specialist Prosecutor

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**Corrected Version of Prosecution response to Thaçi Appeal against Decision on Motions Challenging the Jurisdiction of the Specialist Chambers (IA009-F00021 dated 30 September 2021)**

**with public Annex 1**

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## I. INTRODUCTION

1. The Specialist Prosecutor's Office ('SPO') hereby responds to the Defence Appeal<sup>1</sup> challenging the jurisdiction of the Specialist Chambers ('KSC'). No error in the Decision<sup>2</sup> is demonstrated, and the Appeal should be rejected in its entirety. Defence submissions misconstrue the applicable framework, present interpretations which go against basic principles of statutory interpretation, and misrepresent the Decision.

2. The Decision correctly determined the applicability of customary international law ('CIL') before the KSC, and established its jurisdiction over the charged crimes and modes of liability in a manner consistent with the Constitution and applicable human rights. It should be upheld.

## II. PROCEDURAL BACKGROUND

3. On 26 October 2020, the Pre-Trial Judge ('PTJ') confirmed a ten-count indictment against the Accused which charged him with a range of crimes against

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<sup>1</sup> Thaçi Defence Appeal Against Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, KSC-BC-2020-06/IA009/F00012, 27 August 2021 ('Appeal').

<sup>2</sup> Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, KSC-BC-2020-06/F00412, 22 July 2021 ('Decision').

humanity and war crimes, including murder, enforced disappearance of persons, persecution, and torture.<sup>3</sup>

4. On 12 March 2021, the Thaçi Defence filed its Preliminary Motion on Jurisdiction,<sup>4</sup> and its Motion challenging jurisdiction on the basis of violations of fundamental rights enshrined in the Constitution<sup>5</sup> which were followed by the SPO Responses on 23 April 2021,<sup>6</sup> and the Thaçi Replies.<sup>7</sup>

5. On 22 July 2021, the PTJ rendered the Decision and rejected the Preliminary Motion on Jurisdiction insofar as it challenges the jurisdiction of the Specialist Chambers in relation to joint criminal enterprise ('JCE') and the charges against Mr Thaçi on the basis that these charges exceed the CoE Report.<sup>8</sup>

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<sup>3</sup> Public Redacted Version of Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, KSC-BC-2020-06/F00026/RED, 26 October 2020 (public version notified 30 November 2020) ('Confirmation Decision').

<sup>4</sup> Preliminary Motion to Dismiss the Indictment due to Lack of Jurisdiction, KSC-BC-2020-06/F00216, 12 March 2021 ('Preliminary Motion on Jurisdiction' or 'Thaçi Motion').

<sup>5</sup> Motion Challenging Jurisdiction on the Basis of Violations of Fundamental Rights Enshrined in the Constitution, KSC-BC-2020-06/F00217, 12 March 2021.

<sup>6</sup> Consolidated Prosecution Response to Preliminary Motions Challenging Joint Criminal Enterprise (JCE), KSC-BC-2020-06/F00263, 23 April 2021; Prosecution Response to Preliminary Motions Concerning Council of Europe Report, Investigation Deadline, and Temporal Mandate, KSC-BC-2020-06/F00259, 23 April 2021 (together the 'SPO Responses').

<sup>7</sup> KSC-BC-2020-06/F00303 ('Thaçi Reply'); KSC-BC-2020-06/F00304 (together with the Thaçi Reply, the 'Thaçi Replies').

<sup>8</sup> Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, Report: Inhumane treatment of people and illicit trafficking in human organs in Kosovo, Doc.12462, 7 January 2011 ('CoE Report').

6. On 28 July 2021, the Court of Appeals Chamber granted the requests of the Defence<sup>9</sup> and the SPO<sup>10</sup> seeking an extension of the time limit to file their respective appeals against the Decision, and responses to any such appeals.<sup>11</sup>

7. On 27 August 2021 the Defence filed the Appeal.

### III. STANDARD OF REVIEW

8. The Court of Appeals applies *mutatis mutandis* the standard of review provided for appeals against judgements under Article 46(1) of the Law<sup>12</sup> to interlocutory appeals.<sup>13</sup> Appeals may be filed alleging an error on a question of law invalidating the judgement, an error fact or an abuse of discretion.

9. Alleging an error of law requires identifying the alleged error, presenting arguments in support of the claim, and explaining how the error invalidates the decision.<sup>14</sup> An allegation of an error of law that has no chance of changing the outcome of a decision may be rejected on that ground.<sup>15</sup>

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<sup>9</sup> Selimi, Krasniqi and Thaçi Defence Request for an Extension of Time to Submit their Appeals against the Pre-Trial Judge's Decision on Preliminary Motions, KSC-BC-2020-06/IA009/F00001, 23 July 2021.

<sup>10</sup> Prosecution Request for Extension of Time Limits, KSC-BC-2020-06/IA009/F00003, 26 July 2021.

<sup>11</sup> Decision on Requests for Variation of Time Limits, KSC-BC-2020-06/IA009/F00005, 28 July 2021. *See also* Decision on Request for Variation of Word Limits, KSC-BC-2020-06/IA009/F00017, 24 September 2021.

<sup>12</sup> Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All references to 'Article' or 'Articles' herein refer to articles of the Law, unless otherwise specified.

<sup>13</sup> Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, KSC-BC-2020-07/IA001/F00005, 9 December 2020, ('Gucati Appeals Decision'), para.10.

<sup>14</sup> Gucati Appeals Decision, KSCS-BC-2020-7/IA001/F00005, para.12.

<sup>15</sup> Gucati Appeals Decision, KSCS-BC-2020-7/IA001/F00005, para.12.

10. An error of fact can only be found if no reasonable trier of fact could have made the impugned finding.<sup>16</sup> In determining whether a finding was reasonable, the Panel will not lightly overturn findings of fact made by a lower level panel.<sup>17</sup>

11. Finding an abuse of discretion requires that the Decision was so unfair or unreasonable as to constitute an abuse of the lower level panel's discretion.<sup>18</sup>

#### IV. SUBMISSIONS

##### A. THE KSC'S JURISDICTION IS COMPATIBLE WITH ARTICLE 103(7) OF THE CONSTITUTION<sup>19</sup>

12. In addressing Article 103(7) of the Constitution, the Kosovo Constitutional Court ('KCC') identified three criteria, being that: (i) the court 'remains within the existing framework of the judicial system' of Kosovo and operate in compliance with its principles, in the sense of its structure, scope of jurisdiction and method of functioning being in compliance with the rights set out in Chapters II and III of the Constitution;<sup>20</sup> (ii) the court be 'based upon law', interpreted consistent with the

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<sup>16</sup> *Gucati Appeals Decision*, KSCS-BC-2020-7/IA001/F00005, para.13.

<sup>17</sup> *Gucati Appeals Decision*, KSCS-BC-2020-7/IA001/F00005, para.13.

<sup>18</sup> *Gucati Appeals Decision*, KSCS-BC-2020-7/IA001/F00005, para.14.

<sup>19</sup> *Contra. Appeal*, paras 13-23.

<sup>20</sup> Constitutional Court of the Republic of Kosovo, Assessment of an Amendment to the Constitution of the Republic of Kosovo proposed by the Government of the Republic of Kosovo and referred by the President of the Assembly of the Republic of Kosovo on 9 March 2015 by Letter No. 05-433/DO-318, Judgment in Case No. KO26/15, ('KCC Judgment'), para.43.

‘established by law’ requirements of Article 6(1) of the European Convention on Human Rights (‘ECHR’);<sup>21</sup> and (iii) there be a necessity for its establishment.<sup>22</sup>

13. Focusing on the third of these requirements, the Defence claims that the KCC identified specific portions of the CoE Report as the basis for the KSC’s specialist status,<sup>23</sup> and in doing so set jurisdictional limits.<sup>24</sup> In particular, the Defence argues that if the KSC were to be found to have jurisdiction to consider matters beyond allegations contained in particular sections of the CoE Report, the necessity for its establishment would ‘evaporate’.<sup>25</sup> These submissions misinterpret the KCC Judgment and the applicable legal framework, and make illogical leaps in reasoning.

14. First, neither the Constitution, the Law, nor the KCC Judgment identify specific sections or allegations within the CoE Report to which the KSC’s jurisdiction is confined. Article 162(1) of the Constitution, which was before the KCC, and Article 6(1) of the Law both use the language of relation to the CoE Report. The Defence relies heavily on the KCC’s description of the CoE Report as outlining a number of ‘highly specific criminal allegations’.<sup>26</sup> However, contrary to Defence submissions, this does not amount to identification of particular portions of the CoE Report, or confinement of the KSC’s jurisdiction. The reference in question is made in the context of the KCC’s

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<sup>21</sup> KCC Judgment, paras 45-48.

<sup>22</sup> KCC Judgment, para.45.

<sup>23</sup> Appeal, paras 16-17.

<sup>24</sup> Appeal, paras 17-21.

<sup>25</sup> Appeal, para.22.

<sup>26</sup> KCC Judgment, para.51.

consideration of the type of allegations which may necessitate specialist measures, procedures or institutions.<sup>27</sup>

15. The KCC was not required to, and did not, pronounce upon the jurisdiction of the KSC. The matter under consideration before it was whether the establishment of specialist chambers was 'necessary' within the meaning of Article 103(7) of the Constitution. The KCC's consideration was consequently confined to the limited enquiry of whether, amongst other factors,<sup>28</sup> the allegations raised in the CoE Report are of a nature which necessitate specialised procedures. It found that they are.<sup>29</sup>

16. However, it does not logically follow from this that the requirement of necessity would only be satisfied by the particular case studies contained in the CoE Report.<sup>30</sup> It was not the particular case studies, in and of themselves, which warranted specialist procedures. Rather, it was certain features and context surrounding them. This is apparent from, *inter alia*, the KCC Judgment itself which - quoting from an ECtHR decision - references 'the fighting of corruption and organised crime'.<sup>31</sup> While

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<sup>27</sup> KCC Judgment, paras 50-52.

<sup>28</sup> For example, the necessity of the KSC also rose from Kosovo's international obligations pursuant to the Exchange of Letters, requiring, *inter alia*, the establishment of such chambers as an environment conducive to the administration of justice. *See* Law, Article 1(2); Constitution, Article 162(1); KCC Judgment, paras 39, 50; Law No.04/L-274 on Ratification of the International Agreement between the Republic of Kosovo and the European Union on the European Union Rule of Law Mission in Kosovo, 23 April 2014 ('Exchange of Letters'), pp.8-9. The Exchange of Letters itself does not have internal page numbering, the SPO has used the pdf page number in the version of Law No.04/L-274 on the KSC's website.

<sup>29</sup> KCC Judgment, para.53.

<sup>30</sup> *Contra*. Appeal, para.22.

<sup>31</sup> KCC Judgment, para.52.



not directly applying to the KSC,<sup>32</sup> those categories were noted by the KCC as illustrative of the type of contexts (rather than specific concrete crimes) in which specialised procedures may be necessary.

17. In the context of the KSC, the applicable legal regime, including its distinct features as a specialised court, arose where impediments to discovery of the truth had been identified. These impediments included the fact that the CoE Report relates to crimes allegedly committed by organised groups. It also includes the reluctance of witnesses to testify, the concern that alleged preparators were in, or close to, positions of power, an identified impunity gap, and possible connections between organised crime and politics.<sup>33</sup>

18. Each of these considerations apply as much to crimes which relate to CoE Report, as they do to the case studies contained in the CoE Report. The KSC is consequently necessary to providing secure, independent, impartial, fair and efficient criminal proceedings.<sup>34</sup> Interpreting and applying jurisdiction in the manner set out in the Decision does not implicate the KSC's compatibility with Article 103(7) of the Constitution, and Ground 1 of the Appeal should be rejected accordingly.

#### B. THE PTJ CORRECTLY INTERPRETED JURISDICTIONAL LIMITS<sup>35</sup>

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<sup>32</sup> It is noted that some of the language in the CoE Report does in fact invoke organised crime.

<sup>33</sup> SCCC, Judgment on the Referral of Proposed Amendments to the Constitution of Kosovo, KSC-CC-2020-11/F00015, 26 November 2020, ('SCCC Judgment'), para.54; KCC Judgment, paras 50-53; CoE Report, paras 169-174.

<sup>34</sup> SCCC Judgment, KSC-CC-2020-11/F00015, paras 55, 68; Law, Art.1. *See also* Exchange of Letters, pp.8-10 (in particular, requiring an environment 'conducive to the proper administration of justice').

<sup>35</sup> *Contra*. Appeal, paras 24-32.

19. The Decision interprets the subject matter jurisdiction of the KSC in accordance with the plain language of the Law, of the Constitution, and in a manner which is concordant with the applicable legal framework as a whole.

20. While certainly, as a minimum, crimes charged must fall within all relevant jurisdictional parameters, the Defence submission that jurisdictional provisions act as a progressive filter misses the point, and the related assertion of error is based on a misreading of the Decision.<sup>36</sup> The jurisdictional provisions of the Law were drafted in full knowledge of, and in the case of subject matter jurisdiction with reference to, the CoE Report. The provisions were, in fact, tailored specifically for the KSC. If temporal and geographic jurisdiction were now to be determined by reference to, and interpretation of, the CoE Report alone, and in the manner advocated by the Defence, Articles 7, 8 and 9(2) are redundant.

21. The Decision therefore does not discordantly apply the 'outer limits of the jurisdictional provisions', as incorrectly claimed by the Defence.<sup>37</sup> Rather, it interprets those provisions together in a coherent manner, which avoids rendering statutory

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<sup>36</sup> Appeal, paras 26-29.

<sup>37</sup> Appeal, para.29. The assertion that the Decision results in the KSC having jurisdiction over 'any international or domestic crimes perpetrated in Kosovo or Albania between 1998 and 2000' (Appeal, para.29), is also self-evidently a misrepresentation of both the Decision and the Law, and is clearly inaccurate. It is, for example, simultaneously too narrow (in that geographic jurisdiction is not necessarily confined only to Kosovo and Albania (Art.9)) and too broad (in that it takes no account of the need for any crimes charged to relate to the CoE Report).

provisions meaningless.<sup>38</sup> The Defence advances interpretations which involve voiding the Law's plain language, and such arguments must be rejected.<sup>39</sup>

22. The attempted reliance on Article 1(2)<sup>40</sup> is also unavailing. As the Decision correctly finds, Article 1(2) addresses the scope and purpose of the Law, rather than setting out jurisdictional parameters.<sup>41</sup> The Defence seeks to reframe this as 'the Court's' scope and purpose.<sup>42</sup> However, setting the KSC's scope and purpose is not what Article 1 does, nor even purports to do. Article 1 (entitled 'The Scope and Purpose of the Law') provides, in descriptive terms, what the *Law* sets out to do, being, to establish and regulate the organisation, functioning and jurisdiction of the KSC and SPO,<sup>43</sup> and to fulfil Kosovo's international obligations undertaken pursuant to Law No.04/L-274.<sup>44</sup> As reflected in Article 1(2), those obligations included: (i) establishing specialist chambers and a specialist prosecutor's office for any criminal proceedings arising out of investigations, then ongoing, by the SITF; and (ii) adopting appropriate legislation for the establishment and operation of those chambers in accordance with the terms outlined in the Exchange of Letters.<sup>45</sup> As such, the Decision correctly

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<sup>38</sup> Decision, para.110.

<sup>39</sup> See Scalia and Garner, *Reading Law: The Interpretation of Legal Texts* (Thomson Reuters 2012), chapter 27 (Harmonious-Reading Canon: the provisions of a text should be interpreted in a way that renders them compatible, not contradictory). See also chapter 5 (Presumption of Validity: an interpretation that validates outweighs one that invalidates (*ut res magis valeat quam pereat*)).

<sup>40</sup> Appeal, paras 27-28, 31-32.

<sup>41</sup> Decision, para.120.

<sup>42</sup> Appeal, para.31.

<sup>43</sup> Article 1(1). With Chapter III of the Law then in turn addressing Jurisdiction and Applicable Law.

<sup>44</sup> Article 1(2).

<sup>45</sup> Exchange of Letters, pp.8-9.

identified that Article 1(2) does not set jurisdictional limits, and that finding should be upheld.

23. Although as indicated above Article 1(2) is not jurisdictional in nature, it is nonetheless observed that it could not serve to impose the limits which the Defence seeks. As noted in the Decision,<sup>46</sup> the Law was adopted after the SITF had publicly indicated certain aspects of the scope of its investigation relating to the CoE Report. Consequently, had the intention of the drafters been to narrow or limit the scope of jurisdiction of the KSC from what had been publicly announced, far more specific language would have been needed than that contained in Article 6(1).<sup>47</sup>

24. Finally, the Defence's assertion that the PTJ failed to conduct the exercise of applying the jurisdictional limits contained in the CoE Report to the charges in the Indictment<sup>48</sup> is simply inaccurate. The PTJ correctly and reasonably concluded that the charges in the Indictment relate to the CoE Report.<sup>49</sup> This finding was based on: (i) having correctly identified the applicable standard (i.e. that the charges must 'relate to' to CoE Report);<sup>50</sup> (ii) identifying relevant factors upon which such relation might be established, and corresponding provisions of the CoE Report;<sup>51</sup> (iii) addressing

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<sup>46</sup> Decision, para.121.

<sup>47</sup> *See similarly* Decision, para.108. Article 1(2) also merely says 'which relate to'. Additionally, although more correctly read in the context of the obligations undertaken pursuant to the Exchange of Letter, the reference to SITF investigations in Article 1(2) could be read as an endorsement of those investigations, the scope of which was known.

<sup>48</sup> Appeal, para.30.

<sup>49</sup> Decision, para.142.

<sup>50</sup> Decision, paras 107, 111, 139.

<sup>51</sup> Decision, para.111.

further challenges to jurisdictional parameters;<sup>52</sup> and (iv) with reference to findings in the Confirmation Decision, applying to the charges factors relevant to ascertaining whether they relate to the CoE Report.<sup>53</sup> There was no error in this approach; the Defence again misrepresents the Decision.

### C. THE PTJ CORRECTLY INTERPRETED THE MARTY REPORT<sup>54</sup>

25. The Decision assesses and makes a finding upon whether the charged crimes 'relate to' the CoE Report.<sup>55</sup> This reflects the express language of Article 162(1) of the Constitution and Article 6(1) of the Law. Consistent with the plain meaning of the relevant phrases, the PTJ consequently required a sufficient connection between the charged crimes and the CoE Report.<sup>56</sup> This does not necessitate perfect overlap, nor does it confine consideration to particular allegations or case studies set out in the CoE Report. The Decision correctly considers the CoE Report as a whole in a manner consistent with the Law and the Constitution – both of which refer to the entire report, and not only to particular sections thereof or allegations therein.

26. With no basis in the Law for doing so, the Defence engages in an exercise of attempting to separate out the CoE Report into 'background', 'context' and 'findings',<sup>57</sup> and seeks to limit the KSC's jurisdiction to particular allegations contained

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<sup>52</sup> Decision, paras 124-138.

<sup>53</sup> Decision, paras 140-141.

<sup>54</sup> *Contra*. Appeal, paras 34-44.

<sup>55</sup> Decision, paras 107, 111, 139. In advocating for a narrow reading, the Defence indicates the incorrect legal standard (Appeal, para.44 – addressing what the CoE Report is 'about', rather than considering what crimes 'relate to' it).

<sup>56</sup> Decision, paras 107, 139.

<sup>57</sup> Appeal, paras 35-36, 44.

in certain sub-sections. The approach is misguided. As found in the Decision, any limitations of such a particular nature would have to have been expressly stated,<sup>58</sup> and they were not.<sup>59</sup>

27. The Defence is also incorrect in claiming that its submissions were not considered or addressed.<sup>60</sup> As the Defence itself partially acknowledges,<sup>61</sup> the Defence filing in question was expressly summarised at some length in the Decision,<sup>62</sup> including noting the particular submission which the Defence claims was not considered.<sup>63</sup> That fact alone would be a sufficient indication that the Defence's claim on appeal is without foundation. There is no requirement for the Decision to continue throughout to reference party submissions each time they may relate to different aspects of the reasoning. Indeed, there is no requirement to respond to each and every argument of a party in order to meet the requirement of providing reasons.<sup>64</sup>

28. Nonetheless, in this instance the Decision does specifically address the Defence submission.<sup>65</sup> The Decision correctly finds that the phrasing of the reference to crimes occurring 'for the most part' from the summer of 1999 onwards, necessarily

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<sup>58</sup> Decision, para.108.

<sup>59</sup> Constitution, Article 162(1); Law, Article 6(1).

<sup>60</sup> Appeal, paras 42-43.

<sup>61</sup> Appeal, para.42.

<sup>62</sup> Decision, paras 41-44.

<sup>63</sup> Decision, para.44.

<sup>64</sup> See ICTY, Prosecutor v. Anto Furundzija [Appeal Judgment](#), IT-95-17/1-A, 21 July 2000, para.69; ICTR, Prosecutor v. Clément Kayishema and Obed Ruzindana, [Judgment \(Reasons\)](#), ICTR-95-1-A, 4 December 2001; paras 165, 245; ICTY, Prosecutor v. Miroslav Kvočka et al. [Appeal Judgement](#), IT-98-30/1-A, 28 February 2005, para.23; ICTY, The Prosecutor v. Radovan Karadzic, [Decision on Duration of Defence Case](#), IT-95-5/18-AR73.10, 29 January 2013, para.21.

<sup>65</sup> Decision, para.135.

encapsulates also crimes occurring before that time period. As submitted by the Defence, and reflected in the Decision, this includes crimes described in the CoE Report which occurred between April and June 1999.<sup>66</sup> However, as also identified in the Decision,<sup>67</sup> the CoE Report contains further temporal reference of relevance which relate to the period prior to the summer of 1999. For example, in a summary which explicitly reflects, amongst other things, the temporal and geographic parameters which would subsequently be granted through the Law, the CoE Report describes certain KLA leaders as having:

ordered – and in some cases personally overseen – assassinations, detentions, beatings and interrogations in various parts of Kosovo and, of particular interest to our work, in the context of KLA-led operations on the territory of Albania, between 1998 and 2000.<sup>68</sup>

29. The Defence's challenges to the Decision's findings on the geographical scope of the CoE Report<sup>69</sup> are similarly without merit. First, the Defence disregards the jurisdictional parameters, and applicable standards, set out in the Law. The KSC's territorial jurisdiction is set by Articles 8 and 9(2) of the Law. By contrast, the assessment of geographical scope being undertaken in the relevant part of the Decision was for the purpose of identifying subject matter jurisdiction for the purposes of Article 6(1).<sup>70</sup> Article 6(1) requires that the crimes charged 'relate to' to CoE Report. This is largely a factual assessment, necessitating consideration of multiple factors including the alleged perpetrators, alleged victims, locations,

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<sup>66</sup> Decision, para.135.

<sup>67</sup> Decision, paras 111, 135-136.

<sup>68</sup> CoE Report, para.72.

<sup>69</sup> Appeal, paras 37-38.

<sup>70</sup> See Appeal, para.37 referring to Decision paras 131-132.

timeframes, the *modus operandi*, the nature of the conduct, the intent behind the conduct and the context in which it occurred.<sup>71</sup> In that context, there would be no error in a panel considering, *inter alia*, whether crimes formed part of the same attack, or same armed conflict, or assessing status of relevant victims (regardless of where they may be transported).<sup>72</sup>

30. Second, jurisdictional parameters are particular to the institution or jurisdiction in question, each of which must interpret and apply their own distinct jurisdictional regime. As such, reference to the jurisdiction of tribunals such as the ICTR are unavailing. Nonetheless, it is noted that no support is provided for the Defence's assertion that the ICTR did not have jurisdiction over crimes committed in the DRC; and that claim is in fact contradicted by the plain language of Article 7 of the ICTR Statute.<sup>73</sup>

31. Finally, and importantly, the Defence fails to acknowledge that the Decision's findings on the geographical scope of the CoE Report rested on broader factors than those which it challenges, and therefore was not the sole basis for the finding.<sup>74</sup> In particular, the Decision noted that the CoE Report contains several references to crimes committed in Kosovo, with no connection to Albania.<sup>75</sup>

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<sup>71</sup> Decision, paras 111, 124-141.

<sup>72</sup> Decision, para.132. *Contra*. Appeal, paras 37-38.

<sup>73</sup> Article 7 of the ICTR Statute (Territorial and Temporal Jurisdiction) provides that territorial jurisdiction shall extend to the entire territory of Rwanda 'as well as to the territory of neighbouring States in respect of [serious violations] committed by Rwandan citizens'.

<sup>74</sup> Decision, paras 130-134.

<sup>75</sup> Decision, para.133 (and references therein).



32. The Defence has failed to demonstrate any error. Ground 3 should be rejected, and the PTJ's findings on subject matter jurisdiction upheld.

D. JCE IS FOUND IN ARTICLE 16(1)(A) OF THE LAW

33. The Decision correctly finds that JCE, in all forms, is a form of commission recognised in Article 16(1)(a) of the Law. Defence arguments challenging this finding<sup>76</sup> fail to demonstrate an error of law and instead repeat submissions considered and rejected by the PTJ.<sup>77</sup>

34. In finding that Article 16(1)(a) includes JCE, the Decision expressly confirmed that Article 16(1)(a) must be interpreted within the specific context of the KSC's legal framework.<sup>78</sup> Contrary to Defence submissions,<sup>79</sup> the PTJ correctly identified Article 12 as the central reference point for the applicable law at the KSC.<sup>80</sup> The provision leaves no ambiguity regarding the centrality of CIL at the KSC.

35. The Indictment charges the Accused solely with crimes against humanity and war crimes pursuant to Articles 13-14 and 16. No crimes are charged pursuant to Article 15, which concerns the substantive criminal laws in force under Kosovo law at the relevant time. As the charges are based solely on international law, CIL at the time of the commission of the crimes applies. With regard to modes of liability specifically, Article 16 precisely delineates the modes of liability applicable to crimes under

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<sup>76</sup> Appeal, paras 45-59.

<sup>77</sup> Appeal, paras 45-46, 52.

<sup>78</sup> Decision, para.177. *Contra* Appeal, paras 45-59.

<sup>79</sup> Appeal, paras 54-59.

<sup>80</sup> Decision, para.91.

Articles 13-15. Article 16(1) refers to Articles 13-14 and, consistent therewith, identifies modes of liability recognised under CIL.

36. The Defence's references to Article 19(2) of the Constitution, which provides that 'legally binding norms of international law have superiority over the laws of the Republic of Kosovo', does not alter this analysis. That the Kosovo legislator understood the crimes and modes of liability in Articles 13-14 and 16 as 'legally binding norms of international law' is clear. Moreover, this phrase in Article 19(2) of the Constitution can create no uncertainty or limitation in the application of CIL, noting that it is in fact the plain language in Article 12 that confers the primacy of CIL before the KSC. Nothing about that framework is inconsistent with the Constitution, and no error arises.

37. The Decision further explained that the interpretation of the term 'commission' can be understood by assessing the interpretation of virtually identical articles on individual criminal responsibility found in the statutes of other courts.<sup>81</sup> This is consistent with Article 3(3) of the Law and is appropriate, given that the enumerated courts also apply modes of liability found in CIL to war crimes and crimes against humanity, pursuant to their statutes. The PTJ specifically considered Defence arguments on the absence of the words 'joint criminal enterprise' from the Law, and found such arguments unpersuasive.<sup>82</sup>

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<sup>81</sup> Decision, para.177.

<sup>82</sup> Decision, para.177-178.

38. The Decision's interpretation of 'commission' in Article 16(1)(a) should be affirmed. In 2015, when the Law was adopted, five courts - interpreting virtually identical language - had consistently determined that JCE is a form of commission, a statutorily-prescribed means of incurring individual criminal responsibility for war crimes and crimes against humanity.<sup>83</sup>

39. Like the ICTY Statute and other similar statutes, the Law was not enacted in a void. It was adopted by the Kosovo Assembly as the requisite legislation contemplated pursuant to the agreements establishing the KSC.<sup>84</sup> It therefore must be interpreted with consideration given to its context, object and purpose.<sup>85</sup> Article 1, the Scope and Purpose of the Law, states that the court shall exist to *inter alia*, 'ensure secure, independent, impartial, fair and efficient criminal proceedings'.<sup>86</sup> Fulfilling the Law's purpose requires applying it to those bearing responsibility for the crimes

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<sup>83</sup> ICTY, Appeals Chamber, *Prosecutor v. Tadić*, IT-94-1-A Judgement, 15 July 1999 (*Tadić* AJ), para.190; ICTY, Appeals Chamber, *Prosecutor v. Milutinović et al.*, IT-99-37-AR72 'Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise', 21 May 2003 ('Ojdanić JCE Decision'), para.20; ECCC, Trial Chamber, *Co-Prosecutors v. Kaing Guek Eav alias Duch*, 001/18-07-2007/ECCC/TC Judgement, 26 July 2010 ('Duch TJ'), para.511; ECCC, PTC, 002/19-09-2007-ECCC/OCIJ (PTC38) 'Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE)', 20 May 2010 ('PTC Decision on JCE'), para.49; ECCC, Trial Chamber, 0002/19-09-2007/ECCC/TC 'Decision on the Applicability of Joint Criminal Enterprise', 12 September 2011 ('ECCC TC JCE Decision') paras 15, 22; ICTR, Appeals Chamber, *Prosecutor v. Ntakirutimana and Ntakirutimana*, ICTR-96-10-A and ICTR-96-17-A Judgement, 13 December 2004 ('Ntakirutimana AJ'), paras 461-484; SCSL, Trial Chamber II, *Prosecutor v. Brima et al.*, SCSL-04-16-T 'Decision on Defence Motions for Judgment of Acquittal pursuant to Rule 98', 31 March 2006 ('Brima et al. Decision on Judgment of Acquittal'), paras 308-326.

<sup>84</sup> Decision on Motions Challenging the Legality of the SC and SPO and Alleging Violations of Certain Constitutional Rights of the Accused, KSC-BC-2020-06/F00450, 31 August 2021, paras. 86-88.

<sup>85</sup> See Consolidated Prosecution Response to Preliminary Motions Challenging Joint Criminal Enterprise, KSC-BC-2020-06/F00263, 23 April 2021 ('SPO Response JCE'), paras 17-20.

<sup>86</sup> Law, Art.1.

within the KSC's jurisdiction, whether they acted alone or together with others.<sup>87</sup> This was an animating concern for the drafters of the CoE Report, who expressed concern about the gravity of crimes and the commission of crimes by those participating in a group.<sup>88</sup> The Law was designed to, and does, include JCE as a mode of liability for precisely these circumstances.

40. The inclusion of JCE as a mode of commission liability reflects the reality of many crimes committed during a period of conflict or unrest. Courts adjudicating the same and related substantive crimes have consistently found that these crimes are frequently perpetrated by groups of individuals acting together in pursuance of a common criminal design, and not solely based on the criminal proclivity of an individual.<sup>89</sup> Some participants may be physical perpetrators, and those who are not may be found to have also made contributions of the same or similar moral gravity.<sup>90</sup> The modes of liability appropriate in such settings support accountability for those whose significant contributions make possible the physical perpetration of crimes.<sup>91</sup>

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<sup>87</sup> See e.g. Law, Art.13-14 (detailing jurisdiction for war crimes and crimes against humanity), Art.16(1)(b-d) (noting and dispensing with any impediment to prosecution based on official position, order by a government or superior, or based on the acts of subordinates).

<sup>88</sup> CoE Report, Executive Summary, Draft Resolution, para.14, Report, paras 7, 69, 169-174, 176.

<sup>89</sup> *Tadić* AJ, para. 191; PTC Decision on JCE, para.55; SCSL, Appeals Chamber, *Prosecutor v. Taylor*, SCSL-03-01-A Judgment, 26 September 2013, para.383.

<sup>90</sup> *Tadić* AJ, para. 191.

<sup>91</sup> *Tadić* AJ, para.192; ICTR, Trial Chamber, *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on the Preliminary Motions by the Defence of Nzirorera, Karemera, Rwamakuba and Ngirumpatse Challenging Jurisdiction in Relation to Joint Criminal Enterprise, 11 May 2004 ('*Karemera* Decision on Preliminary Motions'), para.36; ICTR, Appeals Chamber, *Prosecutor v. Rwamakuba*, ICTR-98-44-AR72.4 'Decision on Interlocutory Appeal regarding Application of Joint Criminal Enterprise to the Crime of Genocide', 22 October 2004, para.29.

41. Prosecution of all persons who committed violations of Articles 13 and 14 is consistent with the plain language, context, object and purpose of the Law, and reflects the nature of the crimes committed during periods of conflict or unrest. The text of Article 16(1)(a), interpreted in light of these factors, includes responsibility for all perpetrators who contribute to the commission of crimes carried out jointly, by a group of persons acting pursuant to a common criminal purpose or JCE.<sup>92</sup> The PTJ's finding on this point is correct and the Defence fails to demonstrate error.

E. THE DECISION REFLECTS DUE CONSIDERATION OF THE ISSUES RELATED TO THE CIL STATUS OF JCE

42. Contrary to Defence submissions, the Decision reveals that the PTJ conducted an analysis of the status of JCE III in CIL and provided reasons for his findings. This includes an analysis of underlying sources of law, and consideration of Defence criticisms of those sources. The Defence over-simplify the PTJ's analysis and ignore relevant findings. No error or abuse of discretion has been demonstrated.

**1. The Decision is not based solely on the PTJ's assessment of the conclusions of other courts**

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<sup>92</sup> See similarly *Tadić* AJ, paras 186, 190 (the Appeals Chamber concluded that the jurisdiction conferred in the Statute must apply *to all those* who participated in the commission of the crimes in question, including '[w]hoever contributes to the commission of crimes by the group of persons or some members of the group, in execution of a common criminal purpose'); Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, 3 May 1993 ('Report of the Secretary-General').

43. Having explicitly considered the sufficiency of the basis upon which they rest,<sup>93</sup> the Decision correctly considers, and endorses, clear and consistent jurisprudence finding that JCE III forms - and, at the time of the charges, formed - part of CIL.<sup>94</sup> There was no requirement for the PTJ to replicate in the Decision prior reasoning with which he agrees. The authorities, their basis and the PTJ's consideration of them is clearly set out. Equally clear is the PTJ's consideration of Defence submissions<sup>95</sup> – the majority of which, as noted in the Decision, merely repeat challenges which had been considered and adjudicated in prior jurisprudence.<sup>96</sup>

44. For example, the PTJ explored the laws forming the statutory foundation of the post-WWII prosecutions for war crimes and crimes against humanity and concluded in respect of the IMT Charter and CCL10 that they 'clearly provide for criminal liability for participation in a common plan or enterprise.'<sup>97</sup> By their terms, these instruments encompass responsibility for not only crimes falling within the common

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<sup>93</sup> Decision, para.186.

<sup>94</sup> Decision, paras 181-190.

<sup>95</sup> Decision, paras 183-189.

<sup>96</sup> *For example*, Decision, para.184 (in respect of JCE 1).

<sup>97</sup> Decision, para.183, including fn.385. *Contra* Appeal, para.61. Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis, 8 August 1945 ('IMT Charter'). Article 6 of the IMT Charter provides that persons: 'participating in the formulation or the execution of a common plan or conspiracy to commit [crimes against peace, war crimes, or crimes against humanity] are responsible *for all acts performed by any persons* in execution of such plan' (emphasis added). Control Council Law Nr. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, 20 December 1945 ('CCL10'). Article II(2) of CCL10 provides that '[a]ny person...is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was *connected with plans or enterprises involving its commission*'. CCL10, Article II(2) (emphasis added). It is a requirement for all categories of JCE that there be participation in a common plan or enterprise. *Tadić* AJ, para.227.

plan (JCE I), but also for other crimes committed in the execution of the plan or connected to the plan (JCE III).<sup>98</sup> He thus rejected Defence arguments to the contrary and further clarified that Defence submissions on the *post facto* status of these laws were without merit, noting some of the many sources which make plain that these statutes codified pre-existing law.<sup>99</sup>

45. In respect of JCE I, the Decision demonstrates that the PTJ found that eight cases analysed by other tribunals, which were all the subject of submissions by the SPO, are, despite Defence arguments to the contrary,<sup>100</sup> relevant precedents showing that JCE I is based in CIL.<sup>101</sup>

46. Turning to relevant post-WWII caselaw addressing JCE III, in endorsing the analysis and findings of other courts, the Decision expressly finds that the jurisprudence underlying them provides a ‘clear and sufficient’ basis for the existence

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<sup>98</sup> See IMT Charter, Art.6; CCL10, Art.II(2). Further, as noted by the PTJ, seminal documents related to the adoption of these laws show that liability was expected to attach for members of a common plan or design for each offense committed and that the crimes committed, which were the subject of prosecution pursuant to the IMT Charter and CCL10, included those which were the ‘natural and probable consequence’ of the criminal enterprise. See Decision, para.183 and cites at fn.384.

<sup>99</sup> Decision, para.183. The Defence suggest in the Appeal that the PTJ’s decision to issue a consolidated decision operated to the detriment of the Accused. This is not the case for various reasons. First, the PTJ is not required to address every single argument raised by a party. See ICTY, Prosecutor v. Anto Furundzija [Appeal Judgment](#), IT-95-17/1-A, 21 July 2001, para.69; ICTR, Prosecutor v. Clément Kayishema and Obed Ruzindana, [Judgment \(Reasons\)](#), ICTR-95-1-A, 4 December 2001; paras 165, 245; ICTY, Prosecutor v. Miroslav Kvočka et al. [Appeal Judgement](#), IT-98-30/1-A, 28 February 2005, para.23; ICTY, The Prosecutor v. Radovan Karadzic, [Decision on Duration of Defence Case](#), IT-95-5/18-AR73.10, 29 January 2013, para.21. Second, it is hard to imagine how the PTJ’s explanations as to why challenges by other Defence teams fail could be prejudicial to the Accused. *Contra* Appeal, para.86.

<sup>100</sup> See e.g. Taçi Motion, paras 63.

<sup>101</sup> Decision, para.185.

of JCE III as part of CIL.<sup>102</sup> The analysis in the Decision included an explicit consideration of the elements of state practice and *opinio juris*.<sup>103</sup> The Decision also expressly addresses Defence submissions.<sup>104</sup> Bearing in mind and applying the relevant standard for a rule of CIL, the PTJ specifically stated that he had considered the Defence's arguments, including but not limited to those which match challenges brought before the ECCC, and found that JCE III has CIL status, a finding which aligns with findings made by other courts.<sup>105</sup> Indeed, the Decision expressly sets out the basis upon which it finds certain reasoning in the ECCC decision, which Defence teams had adopted, unpersuasive.<sup>106</sup>

47. Faced with clear, settled and elaborated sources of law and prior analysis and jurisprudence on the matter, there was no error in the PTJ assessing whether or not Defence challenges raised previously unconsidered arguments or were otherwise meritorious to a degree that would warrant departure.<sup>107</sup> As acknowledged by the Defence, pursuant to Article 3(3), the PTJ is entitled to assistance in this exercise from other sources of international law, including similarly-situated courts.<sup>108</sup> Moreover, as set out above, the PTJ opined on relevant sources of law, the requirements for a rule of CIL, and, having assessed the Defence submissions on JCE III, enumerated the

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<sup>102</sup> Decision, para.186.

<sup>103</sup> Decision, para.186.

<sup>104</sup> Decision, para.186. In addition to the examples listed showing the PTJ addressed Defence challenges to the support for JCE III, paras 187-189, 202-208 address Defence submissions against JCE, including JCE III.

<sup>105</sup> Decision, para.186.

<sup>106</sup> Decision, para.186.

<sup>107</sup> For example Decision, para.185 and fn.398.

<sup>108</sup> *Contra* Appeal, para.62.



standard for satisfying the requirements for CIL, applied it, and gave reasons for his decision. This does not constitute a deferral to the conclusions of other international courts.<sup>109</sup>

48. Defence arguments about the differences in approach between the PTJ's Decision, compared to decisions of other courts, are not persuasive and cannot ground appellate relief. The PTJ has discretion in how to approach the legal issues before him and how to structure his decision (including how many paragraphs and pages to devote to particular issues raised in the jurisdictional challenges).<sup>110</sup> No error has been demonstrated.

## **2. The PTJ correctly considered the import of the Rome Statute on the question of the CIL status of JCE**

49. The Rome Statute is a treaty, applicable at the ICC. It is binding on those who are subject to the ICC's jurisdiction. It does not determine the jurisdiction of the KSC as it has not been adopted in the statutory framework of the KSC. As correctly found in the Decision, CIL is applicable at this court, including in respect of modes of liability. The existence of a treaty, as it has been interpreted by judges at another court, does not change this. The KSC's jurisdiction, as prescribed in Article 16(1)(a), must be assessed against the meaning of that provision, not against judicial interpretations of Article 25(3) of the Rome Statute.<sup>111</sup> The PTJ correctly found that the incorporation of

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<sup>109</sup> *Contra Appeal*, para.67.

<sup>110</sup> *Contra Appeal*, paras 64-65.

<sup>111</sup> As held by the ICTY Appeals Chamber, unlike the ICTY Statute (or the Law) the Rome Statute is the exemplar of a meticulously detailed code. *Ojdanić* JCE Decision, para.18.

a mode of liability in the ICC Statute may be relevant, but not determinative to that notion's customary nature, but that in any event, the existence of co-perpetration in the ICC Statute is not relevant to the question of the CIL status of JCE.<sup>112</sup>

50. The Defence's lengthy analysis of the drafting history of the Rome Statute does not change that analysis. Such drafting history has primary relevance to interpretation of the Statute before the ICC. Even if the drafting history is of interest for other courts, it does not undermine the development of CIL which occurred prior to its adoption, in the case of JCE as of no later than the WWII—era, and which has continued to be applicable. It does not remove the foundations of a mode or crime in CIL. Given that the ICC is treaty-based, it is logical that the delegates sought to reach agreement on the substantive crimes, modes and other matters within the ICC's remit.<sup>113</sup> That in many instances they drew on CIL in doing so is also logical but not determinative. Article 25(3), which includes co-perpetration as a mode of individual criminal liability, did not, in 1998, exclude or reject JCE as a continuing mode of liability under CIL; neither does its interpretation by relevant chambers of the ICC. Indeed, Chambers

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<sup>112</sup> Decision, para.187. *Contra* Appeal, paras 66, 69, 80 (arguing that the PTJ failed to consider and acknowledge the impact, if any, of the existence of co-perpetration, including as interpreted by the ICC). Similarly, the Defence claim that the PTJ failed to address its related arguments about national proceedings and general principles of law found in domestic systems in paras 68, 69 and 78, are assessed by the PTJ in Decision, para.189.

<sup>113</sup> The Defence's own cited jurisprudence acknowledges that the delegates did not seek to exhaustively codify all CIL as scribes, but that they were compelled to 'craft' in some instances in a manner akin to 'legislating' as general agreement existed in terms of concepts, but not necessarily precise content. *See* Appeal, para. 74 and fn.99 citing fn.35 of Sadat, Leila N. and Carden, S. Richard, 'The New International Criminal Court: An Uneasy Revolution' (2000) 88(381) *Georgetown Law Journal*, p.389-390. This process necessarily involves making choices, howsoever characterized, and does not undermine the PTJ's determination that the state parties were not seeking to codify CIL but rather decided which modes of liability should be included in the ICC's jurisdiction. *Contra* Appeal, paras 70-75.

faced with similar defence challenges to JCE based on the practice of ICC chambers applying Article 25(3) have found that the CIL status of JCE is unaffected. As stated by the ICTY Appeals Chamber in response to *Dorđević's* similar claim:

the interpretation in the ICC jurisprudence regarding the objective or subjective elements of the mode of liability based on a “common purpose” derived from the ICC Statute does not undermine the Tribunal’s analysis on the issue of the existence of the “notion of common purpose” in CIL.<sup>114</sup>

The Appeals Panel should similarly reject this ground of appeal.

F. THE PTJ CORRECTLY FOUND THAT JCE WAS ACCESSIBLE AND FORESEEABLE TO THE ACCUSED

51. The Defence fails to show that the PTJ’s decision on the foreseeability and accessibility is unfair or unreasonable and constitutes an abuse of discretion.<sup>115</sup> The Decision contains a robust assessment of the legal standard applicable to assessing these requirements, reflects consideration of the parties’ arguments, and provides reasons for reaching the conclusion that JCE, in all forms, was foreseeable and accessible to the Accused at the relevant time.

52. First, in respect of the legal standard applied, the PTJ correctly considered the requirements, including with respect to legality<sup>116</sup> and what types of law may be

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<sup>114</sup> *Dorđević* AJ, para.38.

<sup>115</sup> *Contra* Appeal, paras 81-86.

<sup>116</sup> Decision, para.192. *See e.g. Hadžihasanović et al.* Jurisdiction Appeal Decision, para.34 (noting that the conduct in question only need be ‘criminal in the sense generally understood, without reference to any specific provision’); *See Vasiliauskas v. Lithuania* [GC], para.154; *S.W. v. UK*, para.35; *Cantoni v. France*, para.29 (noting that the requirement of legality is satisfied when the individual can know from the

considered,<sup>117</sup> and how the analysis may depend on content, a concept sometimes referred to as the specificity of international law.<sup>118</sup> Based on the foregoing, the PTJ clearly laid out the legal standard, and addressed the arguments claiming a lack of foreseeability based on an absence of precise uniformity in terminology.<sup>119</sup> This is in line with relevant jurisprudence, which further makes clear that no violation of legality is incurred by the gradual clarification of the rules of criminal liability through judicial interpretation, which in turn allows the progressive development of the law by the court.<sup>120</sup>

53. Next, the Decision assessed the weight to be given to Defence arguments that a person in the position of the Accused at the relevant time would not be able to

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wording of the relevant provision, and if need be, with the assistance of the courts' interpretation and with informed legal advice, what acts and omissions will make him or her criminally liable).

<sup>117</sup> Decision, para.193. Customary law may be represented in unwritten law and practice and may still be sufficient to determine whether the principle of legality has been abridged. *Ojdanić* JCE Decision, para.41; *Duch* TJ, ECCC, paras 290, 26 July 2010. See also *Vasiliauskas v. Lithuania* [GC], para.154; *S.W. v. UK*, para.35; *Cantoni v. France*, para.29.

<sup>118</sup> Decision, para.193. See e.g. *Hostages*, p.1241 (noting that international criminal law, by its nature, has developed progressively and that customary law, is, by definition, elastic and not static); *Holzer et. al.*, p.336; *Justice*, Judgment, p. 966 (noting that 'international law is not the product of statute. Its content is not static. The absence from the world of any governmental body authorised to enact substantive rules of international law has not prevented the progressive development of that law. After the manner of the English common law it has grown to meet the exigencies of changing conditions'.); *Ojdanić* JCE Decision, paras 37-43; *Duch* TJ, para.31. PTC Decision on JCE, para. 45 citing *Ojdanić* JCE Decision, paras 37-39.

<sup>119</sup> Decision, para.193.

<sup>120</sup> See *S.W. v. The United Kingdom*, para.35-36 (interpreting Article 7(1) of the European Convention on Human Rights which provides in part: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time it was committed."); *Kokkinakis v. Greece*, paras 36, 40 (ECHR); *EV v Turkey*, Judgment, 7 February 2002, para.52. See also ECtHR, *C.R. v United Kingdom*, Judgment, Application No. 20190/92, 22 November 1995, para. 34; ECtHR, *Streletz, Kessler and Krenz v. Germany*, Judgment, Application No. 37201/97, 22 March 2001, para.29.

foresee criminal liability based on committing crimes as part of a common plan. In deciding this question, the PTJ considered Defence arguments that neither domestic law nor the existence of JCE in CIL, including as systematised in *Tadić*, were sufficient to satisfy the requirements of foreseeability and accessibility.<sup>121</sup> In respect of the CIL status of JCE, the PTJ noted that *Furundžija* was issued in 1998, and found that neither the date of *Tadić* nor Defence claims as to inconsistency in interpretation of the principles in ICTY/ICTR decisions,<sup>122</sup> demonstrate that JCE was not accessible and foreseeable.<sup>123</sup> Indeed, there is no issue with the date of the systematisation of JCE in *Tadić*, which confirmed that the requirements for application of this mode of liability were met as of the date of the events in the *Tadić* case, which precedes the Indictment period.<sup>124</sup> Further, due to the positions of the Accused, the post-WWII general legal framework, and ongoing ICTY prosecutions, the PTJ found that the requirement of foreseeability is met.<sup>125</sup>

54. While the Defence disagree with these reasons,<sup>126</sup> the arguments are not persuasive and do not reveal any unfair or unreasonable calculations by the PTJ. The Defence have not advanced any persuasive reasons to explain how the standard found by the PTJ, which specifically notes that the foreseeability requirement is met if the

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<sup>121</sup> Decision, paras 194-200. Contrary to the Appeal, paras 85-86, the Decision reflects consideration of the arguments raised in Thaci Motion, para.62; Thaci Reply, paras.26-29.

<sup>122</sup> *Contra* Appeal, para.66. The PTJ noted that he had already considered any challenge to the legality of JCE based on the characterisation of JCE at Decision, para.190.

<sup>123</sup> Decision, paras 193-194, 201.

<sup>124</sup> The attacks that were the subject of the indictment occurred on 14 June 1992. *See Ojdanić* JCE Decision, para.29 (confirming that in *Tadić*, the ICTY Appeals Chamber was satisfied that state practice and *opinio juris* were sufficient to establish the CIL status of JCE as of 1992 when the crimes were committed).

<sup>125</sup> Decision, para.194.

<sup>126</sup> Appeal, paras 82-83

person may be found to know from the wording of a law (national or international, written or unwritten), with the assistance of the courts' interpretation and informed legal advice if need be, what acts and omissions attract liability.<sup>127</sup> This is the correct standard, which was reasonably applied to the Accused.

55. While the PTJ provided the reasons for his finding and the Defence has not demonstrated a lack of reasoning or that he failed to consider relevant factors, it bears mention that during the time of the events in question, the ICTY, operating pursuant to its Statute and CIL, had jurisdiction over crimes committed in Kosovo. That the ICTY was monitoring crimes and the actions of all sides was publicly known.<sup>128</sup> Beginning in March 1998,<sup>129</sup> the ICTY Prosecutor made a series of public statements which affirmed the ICTY's jurisdiction and the prosecution's investigations into crimes committed in Kosovo.<sup>130</sup> Certain statements were specifically directed to

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<sup>127</sup> See Decision, para.193.

<sup>128</sup> *Contra* Appeal, para.83.

<sup>129</sup> Noting the recent events in Kosovo, the ICTY Prosecutor made a public statement in order to point out that pursuant to its Statute, the ICTY had jurisdiction for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. Importantly, she made clear that 'this jurisdiction is ongoing and covers the recent violence in Kosovo' and that the Prosecutor was in the process of gathering information and evidence and monitoring any subsequent developments. See Prosecutor's Statement Regarding the Tribunal's Jurisdiction in Kosovo, 10 March 1998, The Hague, CC/PIO/302-E available at [icty.org/en/press/prosecutors-statement-regarding-tribunals-jurisdiction-over-kosovo](http://icty.org/en/press/prosecutors-statement-regarding-tribunals-jurisdiction-over-kosovo)

<sup>130</sup> See e.g. Statement by Justice Louise Arbour, Prosecutor of the ICTY, Press Release, 4 November 1998, The Hague, CC/PIU/358-E available at [icty.org/en/press/statement-justice-louise-arbour-prosecutor-icty-0](http://icty.org/en/press/statement-justice-louise-arbour-prosecutor-icty-0) (noting the protracted armed violence between Yugoslav authorities and organised armed groups in Kosovo in 1998 which constitute an internal armed conflict in Kosovo during 1998, over which the ICTY has jurisdiction and the numerous specific and credible allegations of crimes against humanity and war crimes which require further investigations by the ICTY);

leaders,<sup>131</sup> including Kosovo Albanian leaders.<sup>132</sup> That members of the KLA General Staff would lack awareness of ICTY investigations, including those on the ground during 1999, of statements regarding the same made by the Security Council, and of the potential for prosecution pursuant to the applicable law of the ICTY is in fact 'incompatible with reality.'<sup>133</sup>

56. Further, having considered the parties' arguments, the PTJ found that provisions of Kosovo domestic law are relevant to evaluating foreseeability and accessibility.<sup>134</sup> These provisions include multiple SFRY Criminal Code provisions: (i)

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<sup>131</sup> See e.g. Statement by the Prosecutor, Press Release, 31 March 1999, The Hague, CC/PIU/391-E available at [icty.org/en/press/statement-prosecutor-0](http://icty.org/en/press/statement-prosecutor-0) (noting that the OTP will continue to review all information provided which may suggest the commission of crimes within the ICTY's jurisdiction in Kosovo and explaining that a public statement on this date was made necessary in order to ensure dissemination of the contents of a letter sent on 26 March 1999 to FRY authorities; thereafter the Prosecutor read the contents of a letter sent by the Prosecutor to FRY authorities reiterating that the Prosecutor is aware of current reports of escalating violence in Kosovo, reminding FRY authorities of the jurisdiction of the ICTY, and calling on FRY leaders to exercise their authority to deter the commission of future crimes).

<sup>132</sup> See e.g. Prosecutor's Communication to the Contact Group Members, Press Release, 7 July 1998, The Hague, CC/PIO/329-E available at [icty.org/en/press/communication-prosecutor-contact-group-members](http://icty.org/en/press/communication-prosecutor-contact-group-members) (noting the Prosecutor's previous indication that the ICTY has jurisdiction to investigate and prosecute based on the recent events in Kosovo and stressing that 'jurisdiction also includes crimes committed by persons on either side of the conflict' including those in the position of a superior and that investigations by the ICTY are 'likely to continue for a considerable time').

<sup>133</sup> Events in Kosovo were the subject of numerous contemporaneous Security Council resolutions and statements, including with specific requests related to actions undertaken or to be undertaken by the ICTY Prosecutor. The Security Council requested that the ICTY Prosecutor begin gathering information about the violence in Kosovo that may fall within the ICTY's jurisdiction as of no later than 31 March 1998, noting both excessive force used by Serbian police and terrorist actions and support for terrorist actions by the KLA. See UN SC Resolution 1160 (31 March 1998), p.4. Further in Resolution 1199 (23 September 1998), p.4, members of the Kosovo Albanian community and FRY authorities were each called upon to cooperate fully with the ICTY Prosecutor concerning violations within the jurisdiction of the ICTY, and in Resolution 1203 (4 October 1998), p.4, the Security Council called for 'prompt and complete investigations' including international supervision and participation, for all atrocities committed against civilians, and full cooperation with the ICTY.

<sup>134</sup> Decision, paras 195-200.

Article 22, which attributes liability for persons who commit a criminal act jointly and (ii) Article 26, which attributes liability for the acts of members of a group, to those who create or make use of the group for the purpose of committing criminal acts.<sup>135</sup> In addition, Articles 11 and 13 of the SFRY Criminal Code, concerning *mens rea* specify that Kosovo citizens could thus be held criminally liable for crimes that they did not intend, but which were merely a possible or foreseeable outcome of their conduct.<sup>136</sup> Relevant domestic law from the time of the commission of crimes can help establish that the accused could reasonably have known that ‘the offence in question or the offence committed in the way charged in the indictment was prohibited and punishable’.<sup>137</sup>

57. The Defence arguments on appeal merely reflect disagreement with the PTJ’s assessment of the interpretation of provisions of the SFRY Criminal Code, which he interpreted as a whole, and the value of those provisions as a factor in assessing whether the requirement of foreseeability is met. For example, the Defence argues that the text of Article 22 of the SFRY Criminal Code cannot be the basis for JCE III liability, but overlooks that the PTJ found that Articles 22 and 26, *when coupled with Articles 11*

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<sup>135</sup> As noted in the SPO Response JCE, Article 26, specifically contemplates criminal liability for an accused in a situation in which there are multiple persons in a group, for crimes committed based on a criminal plan or design, regardless of whether the accused directly perpetrated the crime, irrespective of the manner of participation, and irrespective of their *mens rea*. See SPO Response JCE, paras 130-131.

<sup>136</sup> Article 11 states that criminal responsibility arises in the presence of ‘premeditation’ or ‘negligence’. Article 13 defines ‘premeditation’, which appears to be used by the Code as a synonym for intent, as follows: [a] criminal act is premeditated if the offender is conscious of his deed and wants its commission; or when he is conscious that a prohibited consequence might result from his act or omission and consents to its occurring.

<sup>137</sup> *Ojdanić* JCE Decision, para.40.



*and 13* reflect relevant aspects of the provisions of JCE III.<sup>138</sup> The Defence arguments against the interpretation of Article 26 of the SFRY Code adopted by the PTJ require ignoring the scope of Article 26, which, by its terms, applies to those who create or make use of, *inter alia*, a group to commit a criminal act.<sup>139</sup> In addition, the PTJ has solid support in the jurisprudence of the ICTY, which was asked to make the same determination on foreseeability and accessibility with reference to the same domestic law and found Article 26 ‘strikingly similar’.<sup>140</sup> The Defence fails to show an error or that this was an unreasonable factor for the PTJ to consider or decision to reach.

## V. CONCLUSION

58. The PTJ correctly found that JCE, including JCE III, exists in the statutory framework of the KSC, and that liability pursuant to JCE was accessible and foreseeable to the Accused during the Indictment period. The Defence submissions on appeal fail to show that the PTJ has reached an erroneous conclusion based on legal errors, including in relation to the relevance of the Rome Statute, nor that he has abused his discretion. The Decision reflects due consideration of relevant factors, including the sources of CIL underpinning the PTJ’s decision and those of other relevant courts similarly interpreting CIL relating to JCE. The Decision is based on a reasonable and correct assessment of the Law and jurisprudence. The Appeal, which

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<sup>138</sup> Decision, para.200 (emphasis added).

<sup>139</sup> *Contra* Appeal, para.84.

<sup>140</sup> *See* Decision, para.197, 199-200 and cites therein. *See similarly* PTC Decision on JCE, para.45. *See also* *Ojdanić* JCE Decision, para.41 (noting that even if the domestic provisions had not existed, there is a long and consistent stream of judicial decisions and international instruments, including those from the post-WWII era, as well as evidence of the notion of common purpose liability in national systems, as elucidated in *Tadić*, that would have permitted any individual to regulate his conduct and provided reasonable notice that if infringed, criminal responsibility may result).

largely repeats the submissions previously made and not accepted should thus be rejected and the Appeals Panel should affirm the applicability of JCE, in all its forms, before the KSC.

VI. RELIEF REQUESTED

59. For the foregoing reasons, the Appeal should be rejected in its entirety.

Word count: 9,282



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**Jack Smith**

**Specialist Prosecutor**

Friday, 15 October 2021  
At The Hague, the Netherlands.

Explanatory Note:

- in paragraphs 2 and 13 the word 'the' was deleted.
- in paragraph 26 a closing quotation mark was added to the word: 'findings'.
- in paragraph 50 the word 'not' was added.